TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1378.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

WILLIAM C. MURDOCK.

No. 1379.

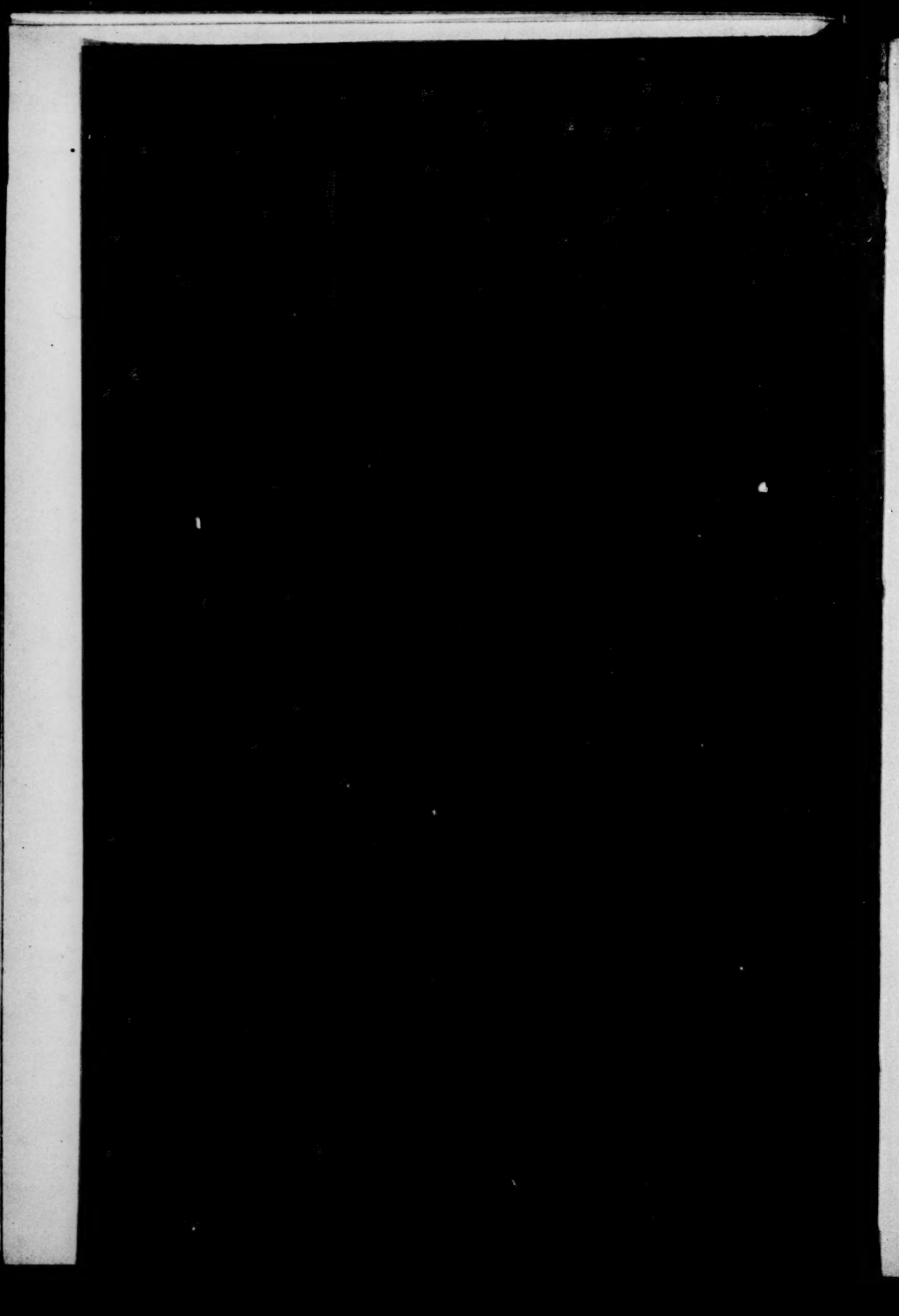
WILLIAM C. MURDOCK, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

APPEALS FROM THE COURT OF CLAIMS.

FILED MARCH 3, 1888.



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1 United States Court of Claims.

WILLIAM C. MURDOCK
against
THE DISTRICT OF COLUMBIA. } No. 371.

I.—*Amended petition.*—*Filed Feb'y* 28, 1884.

To the honorable the judges of said court:

Your petitioner, William C. Murdock, by leave of the court, first had and obtained for the purpose, comes and files this his amended petition, which he prays may be taken and substituted in lieu of his original petition filed in this cause on the 31st day of March, 1883, and thereupon the said claimant respectfully represents:

First. That the petitioner is a citizen and resident of the District of Columbia.

Second. That the defendant, the District of Columbia, is a municipal corporation, created and existing under the acts of the Congress of the United States.

Third. That on or about the 20th day of May, 1875, the petitioner entered into a contract with the defendant called and known as extension of contract numbered 916, of the series of contracts theretofore entered into by the late Board of Public Works of the District of Columbia; and that on or about the 5th day of July, 1875, the 5th day of August, 1875, and the 22nd day of October, 1875, the said petitioner entered into three other contracts with the said defendant, each one of which was also denominated
2 an extension of said contract numbered 916; and that on or about the 7th day of August, 1875, the said petitioner entered into conract with the said defendant known and designated as extension of contract numbered 230½ in the series of contracts theretofore made by the said Board of Public Works; and that on the 2nd day of October, 1875, the said petitioner entered into another contract with the defendant, designated as "extension of contract numbered 384, theretofore entered into by the said Board of Public Works;" and that on or about the 18th day of September, 1875, the petitioner entered into contract with the said defendant known and designated as "agreement under contract numbered 44, theretofore entered into by the said Board of Public Works." That said contracts so made by and between your petitioner and the said defendant, among other things, provided, that for the consideration therein expressed to be paid to him by the said defendant, the petitioner was to lay and construct Scharf concrete pavements on certain streets, alleys, and avenues in the city of Washington and District of Columbia. The streets, avenues, and alleys so to be paved as specified in said contracts were as follows, to wit:

The contract dated May 20, 1875, embraced 15th street west, between Rhode Island avenue and S street; R street north, between 14th and 16th streets; Corcoran street north, between 14th and 16th street west; 17th street west, between Massachusetts avenue and P streets. Contract dated July 5, 1875, embraced S street, between 11th and 14th streets northwest. Contract dated August 5, 1875, embraced alley in square 248; N street, between New Hampshire avenue and 21st streets northwest; O

street, between 15th and 16th streets northwest. Contract dated
3 August 7th, 1875, embraced 3rd street west, between D streets L streets northwest. Contract dated September 18th, 1875, embraced a space at the intersection of K street and Vermont avenue northwest. The contract dated October 2nd, 1875, embraced I street, between New Jersey avenue and North Capitol street northwest. Contract dated 22nd October, 1875, embraced Samson street, between 15th and 17th streets northwest; O street, between 16th and 17th northwest.

That in consideration of the work so to be done by said petitioner, it was stipulated in and by each of said contracts that he should receive therefor the price established and paid by the Board of Public Works for work of similar character; provided, that payment be made in bonds issued by the sinking-fund commissioners of the District of Columbia, under and by virtue of section 7 of the act of Congress approved July 7th, 1874, which bonds were to be received and accepted by petitioner at their par value.

Fourth. The petitioner further shows that he proceeded to execute the work provided for in each of said extensions of contracts, and in so doing constructed in accordance with said contract the Scharf concrete pavement on all portions of the streets and avenues of the said city mentioned in the aforesaid contracts; and the quantity of said pavement so laid by him under said contracts amounted in the aggregate to fifty-two thousand three hundred and forty-eight and twenty-nine one hundredth (52,348 29-100) square yards, of said pavement, and the claimant also in the performance of said work did considerable grading and taking up of old wood pavements and hauling the same for which he was entitled to pay and compensation under the terms of said contract for which he was not paid in full.

4 Fifth. The petitioner further shows that the price established and paid by the said Board of Public Works for said Scharf concrete pavement was $3.20 per square yard; that your petitioner, before and at the time of entering into said contracts, was aware that said price had been established and paid by the Board of Public Works for such work, and that price was in the contemplation of the parties to said contracts at the time they were entered into as aforesaid; and your petitioner expected to be paid for said work at the said rate.

Sixth. Your petitioner further shows that in settlement for the work so done by him, under the said contracts, the accounting officers of the said defendant wrongfully refused to allow petitioners the said sum of $3.20 per square yard for the pavement so laid by him, but allowed and paid him only $3.00 per square yard therefor (except as to 517.45 square yards thereof, for which they paid him at the rate of $3.20 per square yard), contending that that was the price established and paid by the Board of Public Works, all of which will appear by reference to the accounts of said work now on file in the office of the said defendant, which your petitioner prays may be produced and filed in the papers in this cause, and made part of this petition. And the petitioner avers and claims that he is entitled to recover against the said defendant 20 cents per square yard for fifty-one thousand eight hundred and thirty-one and eighty-four one hundredths square yards of said pavement, amounting to ten thousand three hundred and sixty-six and thirty-seven one hundredths dollars, with interest thereon from the time the same became due and payable; and also

such further sum as may be found due him for said grading and hauling upon a proper accounting.

5 Seventh. That there has been no final settlement between your petitioner and said District for the work done by him as aforesaid, and that no part of your petitioner's claim as herein set forth has been rejected by the late Board of Audit, which was created and existed under and by virtue of section six (6) of the act of the Congress of the United States, entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874.

Eighth. That neither said contract nor said claims for said work have been transferred or assigned to any persons, but the right to the same remains in your petitioner, and he is justly entitled to the amount herein claimed.

PRAYER.

Your petitioner therefore prays for a judgment in due form of law against the said District of Columbia for the said sum of ten thousand three hundred and sixty-six thirty-seven one-hundredths dollars, with interest thereon from the time the same became due and payable, and also such further sum as may be found due him for said grading and hauling upon a proper accounting, and that he may have such other relief as the nature of the case may require.

WILLIAM C. MURDOCK.

W. A. COOK,
C. C. COLE,
Atty's for Claimant.

DISTRICT OF COLUMBIA,
Washington County, to wit:

William C. Murdock, the petitioner mentioned in the foregoing petition, being duly sworn, says upon oath that he has heard the fore-
6 going petition read, and knows its contents, and that the matters therein set forth so far as stated upon his own knowledge are true, and those stated upon information and belief he believes to be true.

WILLIAM C. MURDOCK.

Subscribed and sworn to before me this 26th day of February, A. D. 1884.

[SEAL.] E. L. WHITE,
Notary Public.

7 II.—*General traverse.*

And now comes the Attorney-General on behalf of the District of Columbia, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

THOMAS SIMONS,
Assistant Attorney-General.

8 III.—*Plea of set-off.—Filed May* 3, 1886.

And now comes the Attorney-General on behalf of the District of Columbia, and for a further plea says:

That at and before the institution of this suit the said claimant was and

still is indebted unto the District of Columbia in the full and just sum of $3,000.00 for money had and received to the use of the defendant, and the said claimant being so indebted as aforesaid, in consideration thereof promised to pay the defendant the said sum of money on request; yet the said cl't, although often requested so to do, hath not, nor hath any one in his behalf, as yet paid the same sum or any part thereof, but hath wholly neglected and refused, and still neglects and refuses, so to do; which said sum so due as aforesaid the defendant claims to set off against the demand of the claimant, and thereupon he brings his counter claim.

ROBERT A. HOWARD,
Assistant Attorney-General.

9 IV.—*Motion for leave to file amended plea and amended plea.—Filed March 9, 1887.*

The said defendant, by the Attorney-General, moves the court for leave to file the amended plea of offsett presented herewith.

ED. M. WATSON,
Ass't Att'y.

And now comes the Attorney-General, on behalf of the District of Columbia, and for a further plea says:

That at and before the institution of this suit, the claimant was and still is indebted unto the District of Columbia in the full and just sum of $7,000.00 for money had and received to the use of the defendant, and the said claimant being so indebted as aforesaid, in consideration thereof promised to pay the defendant the said sum of money on request; yet the said cl't, although often requested so to do, hath not, nor hath any one in his behalf, as yet paid the same sum or any part thereof, but hath wholly neglected and refused, and still neglects and refuses, so to do; which said sum so due as aforesaid the defendant claims to set off against the demand of the claimant, and thereupon he brings his counter claim.

ROBERT A. HOWARD,
Assistant Attorney-General.

To one payment on De Salle st. (cert. B of Audit No. 19468) of 70 cts. per yard on 2,493$\frac{3}{9}$ sq. yards pavement	$1,745.10
To overpayment, as per report of referee, for excavation	2,549.77
To overpayment for haul of excavation, as per vouchers Nos. 14969 (14699–700) 1911–(19112–13) (14950–1) (14998–9) (14950–1) & (19221–2)	2,337.51
	6,633.38

10 V.—*Judgment of the court of June 2, 1887.*

At a Court of Claims held in the city of Washington, D. C., on the 2nd day of June, A. D. 1887, it was ordered that the judgment entered herein on the 25th day of April, 1887, be vacated and set aside, and that judgment in lieu thereof be entered as follows:

The court, on due consideration of the premises, find for the claimant and do order, adjudge, and decree that the said W. C. Murdock do have and recover, in the manner provided by the act of June, 1880, chapter 243, the sum of six thousand five hundred and sixty-nine $\frac{75}{100}$ dollars ($6,569.75) upon debts of the District of Columbia, due and payable Nov. 1, 1875, within the meaning of the sixth section of the said act.

11 VI.—*Order of the court of Nov'r* 16, 1887.

The motion for a new trial herein filed by the defendant, June 2, 1887, having been held under advisement, and the requests for additional findings of fact having been considered and the former findings having been revised and filed anew this day, said motion is overruled and the judgment entered June 2nd, 1887, is to stand as the judgment of the court upon the findings now entered of record.

12 FINDINGS OF FACTS.

The court, upon the evidence, finds the facts as follows:

I.

The claimant in the year 1875, under extensions of certain contracts, laid in the city of Washington for the defendant 51,830.84 square yards of Scharf pavement, for which payments have been made on the basis of $3 per square yard. Said work was done under the extension of contract, as hereinafter stated.

II.

Contract dated May 20, 1875, being extension of contract No. 916, in the series of contracts made by the Board of Public Works, embraced 15th street west, between Rhode Island avenue and S street; R street north, between 14th and 16th streets; Corcoran street north, between 14th and 16th streets west; 17th street west, between Massachusetts avenue and P street.

Contract dated July 5, 1875 (extension of 916), embraced S street, between 11th and 14th streets northwest.

Contract dated August 5, 1875 (being extension of 916), embraced alley in square 248, O street, between 15th and 16th streets northwest.

Contract dated August 7, 1875 (being extension of 230½), embraced 3d street west, between D and L streets north.

Contract dated September 18, 1875 (being an agreement under contract No. 44), embraced a space at the intersection of K street and Vermont avenue northwest.

Contract dated October 2, 1875 (being extension of contract No. 384), embraced I street northwest, between New Jersey avenue and North Capitol street.

Contract dated October 22, 1875 (being extension of contract No. 916), embraced Samson street, between 15th and 17th streets northwest.

Following are the number of square yards of Scharf concrete pavement laid and put down by claimant on the foregoing streets, avenues, and alleys, under said contract, and for which he was allowed only $3 per square yard therefor, viz:

Under extension of contract No. 916:

	Square yards.
Voucher No. 14698. 15th street NW., bet. R. I. av. and S str., July 21, '75.	7,516.06
Voucher No. 14699–70. R street NW., bet. 14th and 16th streets, July 28, '75	4,502.25
Voucher No. 19111. Corcoran street bet. 14th and 15th streets NW	2,129.30

13 Voucher No. 19112-13. 17th street NW., bet. Mass. ave. and P str ..	2,094.90
Voucher No. 14959-1. S street NW., bet. 11th and 14th sts.....	5,134.90
Voucher No. 14998-9. Alley in square No. 248	2,126.80
Voucher No. 14850-1. O street, bet. 15th and 16th sts. NW.....	1,662.77
Voucher No. 19221-2. Samson street, bet. 15th and 17th sts. NW.....	2,674.00
Voucher No. 19221-2. Q street, bet. 16th and 17th sts. NW.....	2,301.10
Voucher No. 19063-4. Pierce Place, between 14th and 15th NW.....	57.83
Under extension of contract No. 230½:	
Voucher No. 19210. 3d street, bet. D and L streets NW.....	16,359.22
Under extension of contract No. 44:	
Voucher No. 14929. Intersection of K str. and Vermont ave.....	714.84
Under extension of contract No. 384:	
Voucher No. 19415. I street NW., bet. N. Cap. str. and N. J. ave.....	4,556.87
Total	51,830.84
At 20 cents per yard.....	$10,366.17

Under said extensions of contract No. 916 there was allowed and paid claimant under the different works of said contract as follows, to wit:

Voucher No. 14698. 15th street, bet. R. I. ave. and S street, 2,668.50 cubic yards grading, at 30c. per yd	$800.55
Voucher No. 14699-700. R street, bet. 14th and 16th sts. NW., 1,418.60 cubic yards grading, at 30c. p. yd.....	425.58
Voucher No. 19111. Corcoran street, bet. 14th and 15th sts. NW., 510.50 cubic yards grading, at 30c. p. yd.....	153.15
Voucher No. 19112-13. 17th str. NW., bet. Mass. ave. and P street, 528.30 cubic yards grading, at 30c. p. yd.....	158.49
Voucher No. 14950-1. S street NW., bet. 11th and 14th streets, 1,327 cubic yards grading, at 30c. p. yd.....	398.10
Voucher No. 14988-9. Alley in square 248, 409 cubic yards grading, at 40c. p. yd.....	163.60
Voucher No. 14950-1. O street, bet. 15th and 16th strs. NW., 323 cubic yards grading, at 30c. p. yd.....	96.90
Voucher No. 19221-2. Samson street, bet. 15th and 16th strs. NW., 618 cubic yards grading, at 30c. p. yd	185.40
Voucher No. 19221-2. Q street, bet. 16th and 17th strs. NW., 560 cubic yards grading, at 30c. p. yd	168.00
Total	2,549.77

III.—*Extension of contract No.* 916

For and in consideration of the stipulations hereinafter contained it is hereby agreed by and between the Commissioners of the District of Columbia and William C. Murdock that contract No. 916, in the series of contracts made by the Board of Public Works of the District of Columbia, be and the same is hereby extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit:

Lay and put down the Scharf concrete pavement on the carriage-way of S street, between 11th and 14th streets northwest.

It is further agreed that the said William C. Murdock shall receive the prices established and paid by the Board of Public Works for work of similar character: Provided, That payment be made in the bonds issued by the Sinking Fund Commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

In witness whereof this instrument is signed and sealed by the
14 Commissioners of said District appointed under the act of Congress entitled "An act for the government of the District of Co-

lumbia, and for other purposes," approved June 20, 1874; and the party of the second part to these present has hereunto set his hand and seal this 5th day of July, 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
Commissioners of the District of Columbia.
W. C. MURDOCK, [SEAL.]
Contractor.

IV.—*Memorandum executed by Murdock and his sureties and delivered to the Commissioners.*

In consideration of the provisions of a certain contract, entitled "Extension of contract No. 916," and entered into on the 5th of July, 1875, between the Commissioners of the District of Columbia and William C. Murdock, and in order to clearly set forth the true interpretation and effect of said contract, it is hereby stipulated that it is the true meaning of said contract that if at any time during the period of three years from the completion of the work to be done thereunder any part or parcel thereof shall become defective from imperfect or improper material or construction, and in the opinion of the parties thereto of the first part require repairs, the party thereto of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of said parties, and cause and maintain said work to be at the end of said period of three years in good condition and repair and free from defect and from imperfect or improper material or construction, and in case of failure or neglect of said party of the second part to do so, the same shall be done under the directions and orders of said party of the first part at the cost and expense of said party of the second part.

These stipulations do not apply to wood pavements relaid under the contract, nor to any work except the laying and resurfacing or concrete pavements.

Witness my hand and seal this 17th day of December, 1875.

W. C. MURDOCK.

For the consideration and purposes above we hereby assent to the above as being a true interpretation of one of the conditions of the above-mentioned contract covered by the bond on which we are sureties, dated——

Witness our hands and seals this 17th day of December, 1875.

H. A. WILLARD.
JAS. O. CLEPHANE.

The other contracts sued on are substantially like the foregoing contract of 916.

V.—*Extract from the journal of the Board of Public Works of* 1871.

SEPTEMBER 14, 1871.

The Board met at the usual hour.

Present, Governor Cooke, Messrs. Magruder and Shepherd.

* * * * * * *

The following scale of prices for work and material were then adopted by the Board: Wood and concrete pavement, $3 per yard; Scharf and Parisen pavement, $3.20 per yard.

Board adjourned.

The Board of Public Works between 1871 and 1874 and in said years paid $320 to John O. Evans and others, on different contracts, for Scharf pavement, said payments being made on an aggregate of more than 25,000 yards.

15 VI.

On the day of its date there was addressed to the Commissioners of the District, by the claimant, the following communication:

WASHINGTON, D. C., *December* 15, 1875.

Hon. Board of Commissioners of the District of Columbia:

GENTLEMEN: I desire to call your attention to the fact that in working under contract No. 916, on De Sales street. I found it impossible, owing to the terrible condition of the street, to lay a 7 or 8 inch concrete pavement. I was therefore compelled to lay a pavement ranging in depth from 10 to 15 and 18 inches. Under such circumstances I respectfully ask that I may be allowed the same price as paid to me for a 10-inch pavement on Pennsylvania avenue. To confirm the truth of the above statement, I respectfully refer you to the report of the special superintendent, Mr. Phillips, and also to Senator Sargent, who was on the street often during the progress of the work.

Yours, very respectfully,

W. C. MURDOCK,
Contractor.

On said communication is the following indorsement:

DEC. 21, 1875.

Respectfully returned to Hon. Commissioners District of Columbia, inviting attention to the report of the overseer and recommending that the contractor be paid for 10 inches of pavement at the same rate as that allowed on Pennsylvania avenue, to wit, $3.70 per yard.

R. L. HOXIE,
Lieut. Engineer, U. S. A., Engineer of District of Columbia.

On said communication is the following:

Respectfully returned to the engineer approved. By order of the Commissioners.

W. TINDALL, *Sec.*

Letter of overseer referred to in foregoing:

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, December 18, 1875.

To the Engineer, District of Columbia:

SIR: In reference to communication No. 11638, Vol. ———, E. Q., 1875, I have the honor to report that Mr. W. C. Murdock's statement is correct; as the pavement settled it necessitated the use of more material to

keep it up to the grade. There are places over the filled-in portion of the street that the pavement is near 2 feet thick, over which he was obliged to lay an extra heavy top coat that will average 3 inches when compacted—the heaviest top coat laid on any concrete pavement in this city. I therefore recommend that he be paid for a 10-inch pavement, which in my judgment will not compensate the contractor for the labor and material used on La Salle street. The pavement was laid in four courses: 1st layer, stone; 2d, ordinary base; 3d, binder; 4th, top coat. Twice the thickness of ordinary top coat was used, and layer after layer of base and binder as the street settled, to keep the part to the grade.

Very respectfully,

WAL. PHILLIPS,
Overseer Concrete District.

VII.

The Commissioners paid the claimant the sum of $3.70 for the work on De Sales street, which amounted in the aggregate to $1,745.31. The allowance was made after the date of said communications, and after the completion of the work. The amount paid on said work because of the additional allowance of 50 cents per yard is $1,247.25. The said claimant was paid the sum of $1,529.47 for haul over 200 for the grading on the extensions of 916. The Board of Public Works allowed on contract 916 and similar contracts compensation for haul over 200. That had been the custom of the Board at the time the extensions were made of 916, and it does not appear that the allowance was unreasonable in price.

16

VIII.

On the 28th day of July, 1875, a payment was made to claimant for work done to that time based on allowance of $3 per square yard for extensions of contract No. 916, and upon that payment the claimant executed the following receipt:

"Received this 28th day of July, 1875, from the Board of Audit their certificate No. 14698 for $24,278.41, in full settlement of the above-stated claim."

It does not appear that the parties at the time said receipt was given had any settlement of disputed claims or items, or that said receipt was founded on an agreement made at the time, or was the result of a settlement between the parties. Before said payment there was laid of the 51,830.84 the amount of 21,387.41. On said date a similar receipt was executed for $14,285.13 under the same state of facts as detailed above.

IX.

The provisions of these extensions of 916–230½, 44, and 384 are identical.

The extension is as follows:

"For and in consideration of the stipulations hereinafter contained it is agreed by and between the Commissioners of the District of Columbia and William C. Murdock that contract No. 916, in the series of contracts

made by the Board of Public Works of the District of Columbia, be, and the same is hereby, extended with its various terms, conditions, and stipulations to embrace the following work, to wit:

"(Here follow names of streets on which Scharf concrete pavement is to be laid.)

"It is further agreed that the said William C. Murdock shall receive the prices established and paid by the Board of Public Works for work of similar character, provided that payment be made in the bonds of the District of Columbia * * * at their par value."

Contract 916, "the various terms, conditions, and stipulations" of which are incorporated in this extension, provides:

"First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed, to furnish, at his own proper cost and expense, all the necessary materials and labor, and in good, firm, and substantial manner to lay and put down the pavement known as the Scharf concrete pavement on the carriageway, etc.

* * * * * * *

"Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements or from incumbrances or injuries to individuals, property, or otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractor; and the said contractor hereby agrees, in the execution of the said work as aforesaid, to keep at all times the said work properly guarded or protected so as to prevent all injuries to persons, travelers, animals, or property; and in the event of any such injury or injuries occurring in consequence of the insufficient guarding or protection of said work as aforesaid, the said party of the first part shall retain out of any money or moneys due or to become due said contractor a sum sufficient to cover all damages arising out of said injury or injuries until the same may be settled at law or otherwise.

"Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

"Laying and putting down the Scharf concrete pavement per square yard, $3.20, which shall include 2 feet of grading."

17 The ninth clause of the original contract 916 is as follows:

"It is further agreed if, at any time during the period of three years from the completion of the work to be done under this contract, any part or parts thereof shall become defective from imperfect or improper material or construction, and in the opinion of the said party of the first part require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the said party of the first part; and in case of a failure or neglect of the said party of the second part so to do, the same shall be done under

the directions and orders of the said party of the first part at the cost and expense of the said party of the second part.

* * * * * * *

"Thirteenth. And the said party constituting and composing the Board of Public Works in and for the District of Columbia aforesaid agree with the said party of the second part to perform all the stipulations to this contract obligatory in it, and to pay or cause to be paid to the said party of the second part, or to his heirs, executors, or administrators, in lawful money of the United States, the amount which may be found from time to time due him according to the contract."

In 1872 and 1873 the Board of Public Works by order allowed 20 cents for grading in 1872, and in 1873 the sum of 30 cents, and under the order of 1872 they allowed 1 cent per cubic yard for every 200 feet haul over 200 feet, and under the order of 1873 they allowed $1\frac{1}{2}$ cents per cubic yard for the same haul. The above allowances were being made at the time the contracts were extended.

In 1873 the Board of Public Works made contracts for concrete and Scharf pavements, under which it paid contractors the sum of $3.20 per square yard for laying such pavement, which price included two feet of grading. After that time $3.20 was the usual price paid by the Board of Public Works.

X.

The concrete pavement laid by claimant on Pennsylvania avenue, to which he refers in the above communication, was laid under a contract that fixed the price specifically at $3.70 per yard, and contained specifications for the pavement laid thereunder not contained in the contract under which claimant laid the pavement on De Sales street.

CONCLUSIONS OF LAW.

Upon the foregoing the court decides as conclusions of law:

(1) That the claimant is entitled to 20 cents a yard for 51,830.84 yards, making $10,366.17.

(2) That from that amount there is to be deducted the grading, which was less than 2 feet, amounting to $2,549.77.

(3) That the payment made for work on De Sales street was without consideration and authority of law. That the amount overpaid, to wit, $1,247.25, must be deducted from the amount due petitioner on other portions of the contracts, leaving a balance due the claimant of $6,569.75, due and payable as of the first day of November, 1875.

VII.—*Opinion* (*November* 16, 1887).

WELDON, J., delivered the opinion of the court:

The petition alleges that, in the year 1875, the claimant performed a large amount of Scharf paving on the streets of Washington under
18 extension of certain contracts entered into with the District of Columbia. This suit was brought to recover a balance due, as it is alleged, of $10,066.

Under the extension of contracts, the claimant laid 51,830.84 square yards of Scharf pavement, for which he has been paid at the rate of $3 per yard. He was also paid the sum of $4,079.24 for grading and haul, and the sum of $1,247.25 as extra allowance for work on De Sales street, because of the peculiar character of the work, made necessary by the condition of the street at the time the labor was performed.

He insists that under the contract he is entitled to the sum of $3.20 per square yard, the excavation, and haul, and that the Commissioners of the District had authority in law to make the allowance because of the peculiar hardship incident to the work on De Sales street.

The defendant insists that claimant is only entitled in this proceeding to $3 per yard, nothing for excavation and haul, and that the Commissioners exceeded their authority in the allowance of the $1,247.25 on said street.

On the 5th day of April, 1886, by consent of parties, this case was referred to Daniel Donovan, esq., who was directed to report the number of square yards of concrete pavement laid by the claimant for which he has only been allowed $3 per square yard, and for which he is entitled to an additional allowance of 20 cents per square yard under the decision of the court in the case of Cranford & Hoffman v. The District of Columbia. On the 3d of May, A. D. 1886, the said referee made a report, finding a balance in favor of the claimant of $7,816.40, the basis of which finding is an allowance to the claimant of 20 cents per yard on the said 51,830.84, and a deduction from the same of $2,549.77 for the amount paid the claimant for grading, the same being less than 2 feet at every point on said work. Exceptions were filed to this report by both parties, the petitioner objecting to the deduction, and the defendant finally to the report as a whole. Upon the trial of the cause the defendant, having obtained leave to do so, filed a counter claim charging the claimant with the amount allowed for the work on De Sales street.

In order to perfect the right of both sides to review the decision of this court by an appeal to the Supreme Court, we have found the facts as though no reference had been made; and although the case was tried on exceptions to the referee's report, without any request for findings, we have fully developed the case by elaborate findings. The contracts extended, and upon which this suit is prosecuted, are similar in terms to the contracts in the Cranford Case, and the findings in this case, so far as they are applicable to the subject-matter, are similar to the findings in that case.

The extension of the contracts provides:

"It is further agreed that the said William C. Murdock shall receive the prices established and paid by the Board of Public Works for work of a similar character. The court finds in this case as it found in the Cranford case, that the price established and paid for Scharf pavement was $3.20, and that such price included 2 feet of grading."

The original of Contract No. 916 provides:

"Laying and putting down the Scharf concrete pavement, $3.20 per square yard, which shall include 2 feet of grading."

Not only did the contract provide for $3.20, but the action of the Board, by payment and publication of prices, established $3.20 as
19 the price of that class of pavement. There can be no serious question, both from construction and custom, as to the price to which

the claimant is entitled for the 51,830.84 yards laid by him under the various extensions; but the contention arises as to what is the obligation of the party as to the grading. In the Cranford Case, upon a similar contract and finding, it was held by this court:

"The work to be performed is an entirety, for which the claimant is to receive an entire sum as compensation. By the terms of the contract the claimants are to do an entire amount of work, which may include 2 feet of grading or may be less than that amount, and for which, with that contingency, they are to receive the sum of $3.20 per square yard. The entirety of the compensation is not dependent upon whether the grading is exactly 2 feet or falls below that amount. The indication of the intent of the parties is, that the claimants were to do the necessary grading to the extent of 2 feet, and lay the pavement for an entire sum of $3.20 per square yard. It is not a contract of distinct and separate parts, but a contract of legal unity, embracing a variety of matter; but in contemplation of law an indivisible whole. (Cranford and Hoffman v. District of Columbia, 20 C. Cls. R., 376.)"

So it may be said in this case. The parties were to put down a certain character of pavement for a certain price, which price is to be taken as a compensation, and such compensation is to include the necessary grading, not exceeding 2 feet. The grading allowed the claimant was for grading which at no point exceeded a depth of 2 feet. The amount of grading at the price allowed by the engineer amounted to the sum of $2,549.77, and the amount allowed to claimant for a haul over 200 feet is $1,529.47.

It will be seen by reference to the ninth finding, that at the time these extensions were made the Board of Public Works established and paid a compensation for haul over 200 feet, and the $1,529.47 was calculated upon that basis of compensation. It is insisted upon the authority of the Cranford Case that for all work taken after the 28th of July, 1875, there can be a recovery for only $3 per yard. It is contended that on that day there was a settlement made as to the work embraced in the contract of May 20, 1875, on a basis of $3, and for all subsequent work the price is to be calculated on the basis of $3.

It is true, that on that day a receipt in full was given by the claimant on a payment made and calculated on the basis of $3; but it was not executed under the circumstances indicated by the facts of the Cranford Case, and can not be held as a compromise or settlement, or as indicative of the determination of the Commissioners to change the rate for Scharf pavement. It was the act of the engineer, or officer making out the account, with no power to change the rights of the parties. This court has had occasion to pass upon the force of a receipt in full in the case of Cape Ann Granite Company v. The United States (20 C. Cls. R., p. 1). It will be seen by a reference to that case, and the authorities upon which it is based, that a receipt in full is not binding on the parties unless it is the result of a settlement involving the adjustment of differences by way of compromise and settlement. While the law encourages the adjustment of differences by the parties, a receipt in full is inoperative as an estoppel, unless it is based upon a state of facts indicating an adjustment of the claims of the parties.

The counter-claim, filed since the reference of the case, presents to the consideration of the court the question, how far had the Commissioners

the right to bind the District by the payment of money in excess of the contract price, after the completion of the contract, because of a condition of things not known or contemplated by the parties at the time the contract was made?

The payment of the $1,745.48 was made after the completion of the work, and when the rights of the parties became vested as the result of that condition. Whatever was to be done afterward, by way of increasing the compensation, must be founded upon a gratuity, from the representatives of the District to the claimant, because of his misfortunes in the construction of the work. It is insisted by the claimant that the Commissioners had a legal right to consider the hardship of the situation, and pay to the claimant 50 cents additional for every square yard laid by him on the street affected by the difficulties of construction.

We are cited by counsel to Dillon's Municipal Corporations, volume 1, section 477, as an authority to sustain the right of the Commissioners to make the allowance in controversy. A hasty examination of that authority might induce the impression that the adjudged cases go to the extent of holding that the agent of a municipal corporation has a right to deal with the trust to the extent of alleviating the hardship of unforeseen circumstances in allowing pay (after the completion of the contract) beyond the compensation fixed by the contract.

The communication of the claimant, bearing date on the 15th of December, 1875, indicates clearly the character of his claim. He asked for a gratuity pure and simple; so that the allowance was not the result of the settlement of a doubtful claim, but an act of kindness towards a party who had suffered from a condition of things not anticipated in the making of the contract. We have examined all the authorities cited by the learned author, and do not find that any of them go to the extent of clothing a trustee with a right to increase the compensation without the consent of his principal. The Commissioners were dealing with a public trust, and must confine themselves within the boundary of power and discretion indicated by the character and nature of their trust. A trustee must be faithful to the legal rights of his principal before he is generous to the demand of others. There was no inducement, to operate on the mind of the authorities, in the line of the necessity or interest of the District, to justify them in making the allowance. The contract was fully performed, and there was not pending between the parties a doubtful claim which might be, or was, adjusted by the payment. If, while the work was in progress and because of the difficulties, the contractor was about to fail, then, in consideration of the public necessity, the Commissioners might have increased the pay; but this case does not come to that standard, and can not be determined by the law applicable to that condition. The memorandum executed by the claimant and his sureties on the 17th of December, 1875, after the communication of the 15th and before the allowance of the additional compensation, does not increase the liability of the claimant, inasmuch as the legal essence of that agreement was already embraced in the ninth article of the original of contract 916.

There is no evidence that, as to the subject matter of that memorandum, there ever had been any dispute or complication between the parties, as to the intent and meaning of the agreement in relation to the obligation of the claimant to build an enduring and substantial pavement. He took

upon himself by the letter of his obligation the responsibility of meeting just such difficulties as he had to encounter in the prosecution of
21 the work, and having agreed to construct a pavement upon a given street, he must bear the responsibility of the imperfect foundation. (Dermott v. Jones, 2 Wall., p. 1.) Such was evidently the construction of the contract as indicated by the acts of both parties.

Upon the whole case the court holds that the claimant is entitled to receive 20 cents per square yard for 51,830.84 yards, making $10,366.77; that he is to be charged with overpayment $2.549.77 for grading and $1,247.25 for extra allowance on De Sales street, leaving a balance in his favor of $6,569.75. (Roche v. The District of Columbia, 18 C. Cls. R., p. 217.) In justice to the referee we desire to say that, upon a full investigation of the case, we have adopted his findings upon all matters submitted to his determination.

The judgment of the court is that the claimant recover the sum of $6,569.75, due and payable as of the 1st day of November, 1875.

22 VIII.—*Application of defendant for appeal.—Filed in open court Nov.* 16, 1887.

From the final judgment in the above entitled cause in favor of claimant, the defendant, by their Attorney-General, on the 16th day of November, 1887, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Ass't Attorney-General.

23 IX.—*Order of allowance of appeal.*

Upon the application by the defendant for allowance of appeal, the parties having been heard, it appears by the records of this court that—

April 5, 1886, on motion of claimant, in writing, assented to by defendants, the case was referred to a referee to report certain facts;

April 19, 1886, the referee made his report;

April 30, 1886, the claimant filed exceptions to said report;

May 3, 1886, the defendants filed exceptions to said report;

March 3, 1887, the defendant filed amended exceptions to said report;

April 18 and 19, 1887, the case was argued and submitted by the parties;

April 25, 1887, the court filed findings of fact and gave judgment for the claimant in the sum of $6,071.09;

June 2, 1887, said judgment was set aside by the court, and judgment was entered for the claimant in the sum of $6,569.75;

June 2, 1887, motion for new trial filed by the defendants on the grounds—

1st. "The court erred in failing to find all the material facts shown in the proof, and finding facts not shown by the proof;

2nd. The judgment of the court is contrary to the law and the evidence."

Endorsed: "Held under advisement by the court."

Nov. 16, 1887, the following order was made: "Motion for a new trial. This motion, filed by the defendant June 2, 1887, having been

held under advisement, and the requests for additional findings of fact having been considered, and the former finding having been revised and filed anew this day, said motion is overruled and the judgment entered June 2, 1887, is to stand as the judgment of the court upon the findings now entered of record."

The defendant thereupon filed this application for appeal in open court.

Therefore ordered that the application be allowed.

24 WILLIAM C. MURDOCK v. DISTRICT OF COLUMBIA.

X.—*Application by defendant for appeal.*

OPINION.

RICHARDSON, Ch. J., delivered the opinion of the court:

Ordinarily when an application for appeal is made it is an ex parte proceeding, and is allowed, as a matter of course, if the record be completed and in proper condition to be certified to the appellate court. But when the adverse party has asked for a hearing in opposition, and the parties have been heard, it is proper for the court to give its reasons for its action thereon.

The rule of the Supreme Court declares that "in all cases an order of allowance of appeal by the Court of Claims or the chief-justice thereof in vacation, is essential" (20 C. Cls. R., XXXII), and the Supreme Court, in one or more instances, has issued an order requiring the judges of this court to show cause why a mandate should not be issued to compel the Court of Claims to allow an appeal where one has been denied, thereby indicating that the appellate court expects this court to give the reasons in controverted cases of this kind. (McKee's Case, 10 C. Cls. R., 208.)

The claimant objects to the allowance of appeal applied for by the defendant on two grounds: One, that the right of appeal never existed; and the other, that if it ever did exist, the application was not made in due time.

First, as to the right. The District claims act, under which this action is brought (Supplement to Rev. Stat., 562), in section 3, provides that—

"The Attorney-General of the United States shall have authority, and it shall be his duty, to defend the District of Columbia against all such claims against said District of Columbia prosecuted in said Court of Claims and on appeal, in like manner as he is now by law required to defend the United States in said court, * * * with like power of appeal as in cases against the United States tried in said court."

Section 707 of the Revised Statutes provides that—

"An appeal to the Supreme Court shall be allowed on behalf of the United States from all judgments of the Court of Claims adverse to the United States."

This would seem to settle the controversy, without question, were it not for a provision in the next preceding section of the District claims act that—

"In any case, if before trial either party requests in writing a finding of facts by the court, there shall be the same right of appeal either by the District of Columbia or by the claimant, and subject to the same rules and

regulations, as are provided by law for appeals on behalf of the United States or claimants against the United States from the judgments of the Court of Claims."

25 The claimant contends that this provision restricts the right of appeal on the part of both parties to cases in which such a request for findings of fact has been made, and that neither party in this case requested a finding of fact by the court, and so no right of appeal exists.

We are inclined to think that this is not a limitation on the right of appeal given to the Attorney-General by the next succeeding section above quoted, but rather that the latter is an enlargement of the former in favor of the defendant, even if such a request be in all cases a condition precedent to the claimant's rights.

That provision evidently was made with reference to the rules of the Supreme Court and the practice of this court thereunder. The former provides that cases on appeal shall be heard in the Supreme Court upon (among other specified records)—

"A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them [and] in all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of facts and their conclusions of law therein, in open court, before or at the time they enter judgment in the case. (20 C. Cls. R., XXXI.")

In any case under the District claims act the court might be relieved from finding the facts if neither party should request it, and when no facts are found the case, according to the rules, could not be heard on appeal.

In the present case, however, the record shows that practically both parties did request findings by the court. By a written request of claimant the case was referred to a referee to report certain facts, and upon his report coming in each party filed exceptions to it; and the court, taking into consideration their request, did make and file at the time of entering judgment a finding of facts established by the evidence, and so put the case in a condition to be heard on appeal in the Supreme Court.

Second, as to whether the application was filed in due time. Section 708 of the Revised Statutes requires "all appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered."

The first judgment was rendered April 25, 1887, and findings of fact were filed at the same time. On June 2, 1887, that judgment was set aside and a new judgment entered for a different amount, the findings remaining the same. On the same day the defendant filed a motion for a new trial, and the court took the same under advisement. This motion, by the general rules of law on the subject, undoubtedly suspended the finality of the judgment, leaving the same in the control of the court to determine whether it should be disturbed or should stand, and it suspended the obligation as to the time within which to file an appeal until the final disposition of the matter. (Brockett v. Brockett, 2 How., 238; Slaughter-House Case, 10 Wall., 289; Cambretson v. United States, 95 U. S. R., 287.)

The claimant argues that section 1088 of the Revised Statutes takes this case out of the general rule. It is as follows:

"The Court of Claims, at any time while any claim is pending before it or on appeal from it, or within two years next after the final disposi-

tion of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

26 The answer to this is plain. That section gives to the Court of Claims special powers for granting new trials on motion of the United States, for fraud and other enumerated causes, even after judgment has been affirmed by the Supreme Court on appeal. (Ex parte Russell, 16 Wall., 699.) The defendant's motion in this case was not founded on that section and did not allege any of the causes therein specified, but was merely a request to the court; made at the same term the judgment was rendered and while it had full control of the same, to reconsider its action for alleged error of its own and to allow the defendant to show that it had "erred in failing to find all the material facts shown in the proof, and finding facts not shown by the proof, and entering judgment contrary to the law and the evidence."

On the 16th of November, 1887, at the same term of the court (Rev. Stat., sec. 1052), the court entered an order which, after reciting that the motion for a new trial had been held under advisement and requests for additional findings of fact had been considered, and the former facts having been revised and filed anew, overruled the motion and ordered the judgment entered June 2, 1887, to stand as the judgment of the court upon the findings then filed.

This was equivalent to, and in legal effect a new entry of the judgment, or the giving of finality to the former judgment entered at the same term.

At any time during the same term, before control of a case has been lost by the consummation of an appeal, the court on its own motion or on motion of either party may set aside a judgment or may signify its intention to reconsider it; and in such case it does not become final until the order of the court to that effect is entered of record. (Railroad Company v. Bradleys, 7 Wall., 575, 578; Doss v. Tyack, 14 How., 297, 312; Wheeler v. Harris, 13 Wall., 51.)

The application for appeal is allowed.

Davis, J., was not present at the trial of this case and took no part in this decision.

27 XI.—*Claimant's application for appeal and allowance of same.*

From the judgment rendered in the above-entitled cause, the claimant on this 24th day of January, 1888, makes application for and gives notice of an appeal to the Supreme Court of the United States.

C. C. COLE,
Attorney for Cl'm't.

Filed Jan'y 24, 1888.
Allowed in open court.
February 6, 1888.

WILLIAM A. RICHARDSON,
Chief Justice.

28 In the Court of Claims.

XII.

WILLIAM C. MURDOCK
vs.
THE DISTRICT OF COLUMBIA. } No. 371.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusions of law thereon, of the opinions of the court, of the judgment of the court, of the application of defendants for and the allowance of appeal, of the application of claimant for and allowance of appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 25th day of February, A. D. 1888.

[SEAL.]

JOHN RANDOLPH,
Assis't Clerk Court of Claims.

(Indorsement on cover:) No. 1378. The District of Columbia, appellant, *vs.* William C. Murdock, and No. 1379, William C. Murdock, appellant, *vs.* The District of Columbia. Court of Claims. Filed March 3, 1888.

IN THE

Supreme Court of the United States

THE DISTRICT OF COLUMBIA, Appellant,

vs.

WILLIAM C. MURDOCK, Appellee.

No. 1,378.

AND

WILLIAM C. MURDOCK, Appellant,

vs.

THE DISTRICT OF COLUMBIA, Appellee.

No. 1,379.

BRIEF for WILLIAM C. MURDOCK.

C. C. COLE,
JOHN C. FAY,
Attorneys for Claimant.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States.

THE DISTRICT OF COLUMBIA, *Appellant*,

vs.

WILLIAM C. MURDOCK, *Appellee*.

NO. 1,378.

AND

WILLIAM C. MURDOCK, *Appellant*,

vs.

THE DISTRICT OF COLUMBIA, *Appellee*.

NO. 1,379.

BRIEF FOR WILLIAM C. MURDOCK.

STATEMENT.

This was a suit brought by Murdock in the Court of Claims against the District of Columbia, under the act of June 16th, 1880 (21 Stat., 284), to recover the sum of $10,366.17, being the balances due him upon certain contracts entered into between the Commissioners of the District of Columbia, appointed under the act of June 20, 1874 (18 Stat., 116), and himself for laying the "Scharf concrete pavement" on various streets in the District.

The sole question raised by the claimant was whether he was entitled to be paid for the work at the rate of $3 or $3.20 per square yard; and he having laid 51,830

square yards, for which he had only received pay at the rate of $3 per yard, claimed the additional sum of twenty cents per yard. The quantity of work done having been measured by the Engineer of the District, and reported to the court by a referee, to whom the case was referred for such a finding, and whose report is embodied in Finding II, pp. 5, 6, no question was raised below as to the quantity of work for which $3 only had been allowed. The court found the claimant entitled to $10,366.17 (R., p. 11), but deducted therefrom the sums of $2,549.77 and $1,247.25 and rendered judgment for the balance, $6,569.75. The deduction of these two sums is the error now alleged by Murdock.

Assignment of Errors.

1st. That the court erred in awarding to the District of Columbia the sum of $2,549.77, heretofore paid to Murdock for grading certain streets for the District, as an overpayment on account of said work.

2d. That the court erred in awarding to the District of Columbia the sum of $1,247.25, heretofore paid to Murdock for laying Scharf concrete pavement on De Sales street in said District, as an overpayment on account of said work.

3d. The court erred in allowing the recovery back of said sum of $1,247.25, voluntarily paid by the District with full knowledge of all the facts, and in the absence of fraud.

First.

The sum of $2,549.77, which is the subject of the first deduction, is the aggregate of nine payments, scheduled in Finding II (p. 6), made on account of grading the streets which Murdock paved, and which payments are now recovered back upon the theory that this grading ought to have been done without extra charge under the contract.

The correctness, therefore, of this deduction turns upon the true construction of the contracts. The contracts, which are all alike, are designated "Extension of Contract," and one is exhibited in Finding III, pp. 6 and 7. Its terms provide as to payment "that the said Murdock shall receive the prices *established* and *paid* by the Board of Public Works for work of similar character: *Provided*, that payment be made in the bonds issued by the Sinking Fund Commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress, approved June 20, 1874, which bonds shall be accepted and received *at their par value.*"

The price which Murdock was to receive was that which had been *established* and *paid* by the Board of Public Works.

Finding V, pp. 7 and 8, shows that the Board by a formal resolution, entered upon its minutes, established the price of "Scharf" concrete at $3.20 per square yard; and the finding further shows that said board paid $3.20 to Evans and others during the period from 1871 to 1874 on an aggregate of more than 25,000 yards.

This ought to be conclusive of this question. The *established* rate is what the contract called for, not the price fixed in any particular contract. If the Board of Public Works had succeeded in some particular case in making a contract at a rate lower than its established rate or in affixing additional conditions as part of the price, such price is not the measure of the recovery in this case. It appears that some time during 1873 (last paragraph Finding IX, p. 11) the Board of Public Works succeeded in making some contracts at $3.20 per square yard, which required such grading up to two feet in depth, as became necessary, to be done as part of the contract price, but after that time, as well as before, and except in these isolated cases, and how many instances does not appear, the usual price paid was $3.20.

Contract No. 916 was one of those contracts made in 1873, referred to above, in which the Board of Public Works succeeded in getting better terms than the established rates, to the extent of getting the grading done without extra cost. The terms of contract 916 were (p. 10) "laying and putting down the Scharf concrete pavement per square yard, $3.20, *which shall include two feet of grading,*" the italicised words constituting the difference between the established Board rates, as shown in Finding V (p. 7) and the particular rates of contract 916. The work sued for was *not* done under contract 916, but under "Extension of contract 916." Contract 916 was between John O. Evans and the Board of Public Works, made in 1873. Extensions of contract 916 were between W. C. Murdock and the Commissioners of the District of Columbia, made during the summer of 1875. The only bearing that contract 916 has upon extension of contract 916 is that such of its "various terms, conditions, and stipulations" that are not superseded by the provisions of the "extension" are in force and binding upon Murdock. Contract 916 fixed a locality for its work, a specific price, and a medium of payment. These three provisions are changed in the extension. The locality of the work is different, the price is different, and the medium of payment is different. The one fixes $3.20, including grading, *payable in cash;* the other $3.20, exclusive of grading, payable in *depreciated bonds.* If the price in contract 916 was to control the extension would have so expressed it. It would have been unreasonable to expect work to be done for a depreciated bond at the same price that it was worth in cash; and it is respectfully urged that the court below erred in allowing this provision of contract 916 to override and control the express stipulation of the extensions of contract as to the price to be allowed, and thus require the money, heretofore paid for the grading, which, as the court finds in Finding IX, p. 11, was the usual price for grading at the time, to be returned to the District.

To recapitulate:

The contract calls for the price established and paid by the Board of Public Works, in common parlance called "Board rates." Finding V, pp. 7, 8, is:

"V. *Extract from the journal of the Board of Public Works of* 1871.

"SEPTEMBER 14, 1871.

"The Board met at the usual hour.

"Present, Governor Cooke, Messrs. Magruder and Shepherd.

* * * * * *

"The following scale of prices for work and material were then adopted by the Board: Wood and concrete pavement, $3 per yard; Scharf and Parisen pavement, $3.20 per yard.

"Board adjourned.

"The Board of Public Works, between 1871 and 1874 and in said years paid $320 to John O. Evans and others, on different contracts, for Scharf pavement, said payments being made on an aggregate of more than 25,000 yards."

The last paragraph of Finding IX, p. 11, is:

"In 1873 the Board of Public Works made contracts for concrete and Scharf pavements, under which it paid contractors the sum of $3.20 per square yard for laying such pavement, which price included two feet of grading. After that time $3.20 was the usual price paid by the Board of Public Works."

These constitute the indisputable facts; and we respectfully insist that they do not justify the conclusion that the cost of grading was covered by the price for the pave-

ment and will not warrant the deduction from the sum due for the pavement, the cost heretofore paid for grading the streets.

Second.

The second assignment of error relates to the allowance of a second counter-claim or set-off arising out of an alleged overpayment on account of other work done by Murdock not involved in the contracts upon which suit was brought, and aggregating $1,247.25.

The facts out of which this set-off arises are embodied in Finding VI, pp. 8, 9, and are as follows: Murdock had a contract to put the "Scharf" pavement down on De Sales street, or La Salle street, as it is sometimes called; his contract was similar to the "extension" on p. 6. When he got to work he found that a seven or eight inch pavement in depth, owing to the condition of the street, could not be laid at the grade established by the District, and he increased the depth of it to from ten to eighteen inches in order to keep it up to the proper grade. When he had about finished he wrote the Commissioners, calling attention to the heavier pavement that he had laid, and asked that he be allowed the same price that it was usual to pay for a ten-inch pavement. The Commissioners referred his request to their Engineer for report; he in turn referred it to the overseer of concrete, under whose immediate supervision the work was done, who reported (p. 9) that the use of more material became necessary in order to keep the pavement up to grade; that it was two feet thick in some places, the top coat was twice as thick as usual, and layer after layer of base and binder were put on as the street settled to keep it up to the grade, and recommended that Murdock be paid for a ten-inch pavement, and stated that such payment would not compensate the contractor. The Engineer thereupon returned the application, with the overseer's report with his

own recommendation, to the Commissioners that Murdock be paid at the rate of $3.70 instead of $3.20 for the work. The Commissioners having thus ascertained all the facts from a careful investigation, approved the recommendation of their Engineer, and Murdock, on settlement, was allowed and paid $3.70 per yard for the work instead of $3.20, and this difference of *fifty cents* per yard so paid is now allowed by the court in favor of the District.

This claim is raised by the amended plea on page 4, which is, in substance and effect, a common-law count for money had and received. We shall claim that all the elements of proof that are necessary to warrant a recovery in such equitable form of action must be present in order to justify its allowance as a set-off.

To recover this money back it must be shown—

First. That its payment was made in mistake of fact or by fraud, and that it is against conscience for Murdock to retain it. It must either form one of the well-defined exceptions or fall within the well-established rule of *voluntary payments;* in other words, we insist that a payment made "without authority of law" will not support an action to recover back money paid in the absence of mistake or fraud, nor unless it is against conscience to retain it; that municipal corporations form no exception to this rule, and that payments made in mistake of law cannot be recovered back.

Second. We insist that the payment was made with full knowledge of all the facts, uninfluenced by mistake or fraud, that it was a legal, just, and righteous allowance, and was within the powers and duties of the Commissioners of the District.

First. The facts set out in finding VI (p. 89) eliminate from the case any shadow of mistake or fraud, and show that after full investigation, with all the facts before the Commissioners, they concluded to pay more for a heavier and better pavement than they had agreed to pay for a

lighter and more inferior one. They got a pavement of *four* courses instead of *three*, with a top coating "twice the thickness of the ordinary top coat" (p. 9), and they paid for it fifty cents a yard extra, the same price usually paid for a *ten-inch* pavement. They got even then a better and more durable pavement than they paid for; and after having used and enjoyed it for more than twelve years, and after having assessed and collected the additional cost from the abutting property-holders the District now seeks by means of the *equitable* action for money had and received to recover back the fifty cents per yard extra that was then paid. The statement of the case shows that it is not unconscionable for Murdock to retain money so paid, but that it is both just and equitable for him to do so.

The payment was, in the sense of the law, a voluntary payment. There was no element attached to it that can take it out of this well-settled rule. It lacks in every essential the state of facts that will support the action for money had and received; and it is confidently urged that no case can be found that exempts a municipal corporation from the rule cited or entitles it to recovery in an action for money had and received upon any different principles than those that are applicable to all other litigants.

In the case of Lamborn *vs.* County Commissioners, 97 U. S., which was an action to recover back illegal taxes paid, the court say, p. 185: "There are only three grounds on which such a recovery can be maintained—fraud, mistake, or duress. Mistake, in order to be a ground of recovery, must be a mistake of fact and not of law."

"The law is now well settled that where money has been voluntarily paid with a full knowledge of all the facts and circumstances under which it was demanded, it cannot be recovered back upon the ground that the party paying it labored under a misapprehension of his legal rights and obligations."

See also Wait's Actions and Defenses, Vol. IV, p. 487, and cases there cited.

"Money voluntarily paid by one, which at law could not have been recovered of him, cannot, in the absence of fraud or mistake, be recovered back."

Fleetwood *vs.* New York, 2 Sandf., 475.
Mays *vs.* Cincinnati, 1 Ohio St., 268.
Glass Co. *vs.* Boston, 4 Met., 181.
Elliott *vs.* Swartwout, 10 Pet., 150.
Wilson *vs.* Ray, 10 Ad. & El., 82.
Flower *vs.* Lance, 59 N. Y., 610.

"When a person with a full knowledge of the facts voluntarily pays money which the law would not compel him to pay, but which, in equity and conscience, he ought to have paid, he has no remedy to recover it back. From a payment made under such circumstances no promise will be implied to refund the money, there being nothing against conscience in the party who received it retaining it."

Eaton *vs.* Eaton, 35 N. J. Law, 293.
Bize *vs.* Bartenshlag, 1 T. R., 285.
Farmer *vs.* Arundel, 2 W. Bl., 824.
2 Smith Leading Cases, 465.

"No action will lie to recover back money voluntarily paid with a full knowledge of the facts and circumstances under which it was demanded, though the payment may have been made under protest."

Awalt *vs.* Building Ass'n, 34 Md.
Lester *vs.* Balto., 29 Md., 415.
Bank *vs.* Linder, 74 Pa. State, 371.

The authorities on this subject are uniform, and no principle of law is better settled than the one relied on. The facts that at the expense of the contractor the Dis-

trict got a more durable pavement than it paid for tend rather to make its present demand for a return of a part of the price unconscionable.

What, then, is there to exempt the District of Columbia from the operation of this well-settled rule? The learned court below seemed to overlook this principle entirely or to base this right of recovery upon the theory that a municipal corporation was exempt from its provision, that, so far as the officers of such a corporation were concerned, their acts, within the general scope of their authority, might be repudiated if by misconstruction of the law they made a payment not legally enforceable. The right to recover this money back is placed in the conclusions of law (p. 11), as follows: "That the payment for work on De Sales street was without consideration and *authority of law*." The question of consideration we will consider under the second point.

The act of June 20, 1874 (18 Stat., 116), placed the control of the streets and confided their improvement and and repairs to the Commissioners. They were empowered to make contracts, collect taxes, and apply the revenues of the corporation. No one will question but that the Commissioners could have contracted with Murdock to pay him $3.70 for laying the pavement on De Sales street; could have agreed with him to cancel the contract after it was made and to make a new one. There was no provision in the charter forbidding the increase of contract rates or requiring contracts to be let to the lowest bidder. The learned Court of Claims say (p. 14): "If, while the work was in progress and because of the difficulties, the contractor was about to fail, then, in consideration of the public necessity, the Commissioners might have increased the pay." This would seem to make the Commissioners' rights and powers depend on the solvency or insolvency of a particular contractor. The increase could be granted to save from insolvency, but not to repay losses incurred

that had already accrued to the benefit of the District. This, it is respectfully insisted, would put a premium on bad faith and a loss upon the honest, faithful contractor, who, overcoming intervening difficulties, trusts to the fair dealing of the corporation to pay for what it has received, even though it was better than contracted for.

Second. We insist that the payment was made without fraud, with full knowledge of the facts; that it was a just and legal payment and within the powers of the Commissioners.

That no mistake or fraud existed is not open to question. Was it a just payment? The learned Court of Claims seem to treat this payment as a pure gratuity. We respectfully submit that such is not the fact. A gratuity is where one gives something for nothing; there is a vast difference between a gratuity and a payment in discharge of an equitable claim. It cannot be said that the District received nothing or no benefit from the additional work. Slight consideration of the matter will satisfy any one that a pavement that has *twice* the thickness of the *usual wearing surface* will wear, if not twice as long, certainly longer than the ordnary pavement. If the District expected to pay for a pavement that was to last three years but got one that would last *five*, did she receive no benefit, and was the increase of about fifteen per cent. paid therefor a gratuity?

The facts do not warrant the conclusion of the court that Murdock was bound to build the pavement that he did under the terms of his contract, or that the condition of the street was one of the contingencies of the contract that he was bound to assume.

What was the cause or necessity for the increase of material? It is stated in Overseer Phillips' report (Finding VI, pp. 8, 9) to have been caused in order to keep the pavement *up to grade.* The inference from the facts is that this was a newly filled street, and hence settled. Murdock

did not agree to put the pavement *down at any particular grade;* no such covenant is found in his contract, and he could have fulfilled his obligation so far as the contract went by putting down his pavement on the street as it was when the District authorities turned it over to him. The filling of stone that he put in was extra work. If the street superintendent required the pavement to be laid to a particular grade the raising of the street so that when he laid the pavement upon it its top surface would be coincident with the proper grade would have constituted a legitimate and proper demand for extra work.

We insist, therefore, that Murdock had not only an equitable but a legal claim for the allowance that he received.

If this position be true, there can be no further cause of controversy; but, assuming that there was no legal claim, we insist that the Commissioners were fully authorized to make the allowance.

In Judge Dillon's work on Municipal Corporations, sec. 477, the right to grant additional compensation is affirmed in this language:

"If it has obtained a contract which by mistake or a change of circumstances it deems to operate oppressively upon the other party, an agreement to make an additional compensation or to modify or annul it is not invalid for want of consideration."

In the case of Meech *vs.* Buffalo, 29 N. Y., 198, the leading case on this subject, in which Judges Wright, Mullin, and Johnson all wrote concurring opinions, the court held that a municipal corporation having power to make a public improvement, and incidentally the power to contract for doing the work, may voluntarily increase the contract price where the circumstances will equitably justify it, *unless prohibited by its charter from doing so.*

There must be an absolute prohibition, or the corporation is not restrained from doing justice.

Judge Wright, on page 212, says: "Having made a contract for the construction of a sewer in this case, it could afterwards have canceled or modified it by increasing the contract price. In short, it could deal with it *in the same manner as if it was a natural person.*"

To the same effect is State *vs.* Town of Guttenberg, 38 N. J. Law, 419, where the town remitted a penalty in favor of a contractor, and the court held that it was within its power so to do.

Upon the subject of equitable considerations see also—

Bean *vs.* Jay, 23 Maine, 117.

Baileyville *vs.* Lowell, 20 Maine, 178, and cases cited in Dillon on Mun. Corp., sec. 477.

As to whether such corporation can pay money as an indemnity, after the loss has occurred, the following cases fully attest:

Gregory *vs.* Bridgeport, 41 Conn., 76.

State *vs.* Hammonton, 38 N. J. Law, 430.

Sherman *vs.* Carr, 8 R. I., 431.

See also case of Crawshaw *vs.* Roxbury, 7 Gray, 374.

It seems, therefore, upon every aspect of the case the allowance was a just, lawful, and proper one, and upon no legal principle can it be recovered back.

The Defendant's Contentions.

It was insisted in the court below, on behalf of the defendant, as follows, to wit:

First. *That the contract price was* $3.00.

Second. *That even if the contract price was* $3.20, *still the claimant, having signed receipts in full on being paid* $3.00, *is estopped from claiming more.*

Third. *That if the court should hold that* $3.20 *was the price intended by the parties, and claimant entitled now to recover, then that price included necessary grading up to two*

feet and entitled the defendant to a set-off for $2,549.77, *the amount paid claimant for grading.*

Fourth. *That defendant is entitled to a set-off for the amount paid claimant for hauling.*

Fifth. *That defendant is entitled to a set-off for the sum paid claimant for work on De Sales street in excess of the original contract price.*

The *third* and *fifth* contentions of defendant have already been considered in this brief under the *first* and *second* assignments of error. The *first*, *second*, and *fourth* have been eliminated from the record by the findings of fact.

The Contract Price

Is found by the court below, as matter of fact, to be $3.20 per square yard. Finding III, p. 16, gives the contract, which uses the language, "*prices established and paid by the Board of Public Works for work of similar character.*" In Finding V, pp. 7 and 8, the resolution of that Board is given, bearing date Sept. 14, 1871, establishing the price at $3.20, and in the same finding it is stated as a fact that this price was actually paid by that Board from 1871 to 1874, during all its existence, and there is no intimation in the findings that it ever varied from this price. It is found that in a few isolated cases such price included two feet of grading. The court, in Findings III and V, find, in terms, that $3.20 was the price agreed upon in the contracts sued upon. This disposes of the question whether that included two feet of grading where necessary, or not.

The Claim of Set-off for Hauling.

Finding VII, p. 9, states that "claimant was paid the sum $1,529 for haul over 200 for the grading on the extensions of 916. The Board of Public Works allowed on contract

916 and similar contracts compensation for haul over 200. That had been the custom of the Board at the time the extensions were made of 916, and it does not appear that the allowance was unreasonable in price." What is meant by the expression "over 200" is a little more fully explained in next to last paragraph of Finding IX, p. 11. These findings establish the fact that prior to the time of the making of the contracts sued on, and under contract 916, of which most of them were extensions, it had been customary to pay for hauling. This was a price "established and paid" by the Board of Public Works for hauling, and by the very letter of his contracts claimant was and is entitled to it. The finding does not show at what rate the hauling was paid for, but it is inferrable that it was the rate mentioned in Finding IX, for in Finding VII it is stated to be reasonable. There seems to be no room for contention here.

The Effect of the Receipts in Full.

It is set forth in Finding VIII (p. 9) that there was no settlement of disputed claims at the time the receipts were given, and the same were not founded upon any settlement or any new consideration.

Where a person gives a receipt in full upon receiving a part only of the amount due him, the receipt is no bar to a suit for the recovery of the balance, unless it be given for some new and independent consideration.

Bostwick *vs.* The United States, 94 U. S., 53.

In the case cited the United States rented land in the District of Columbia. The contract of renting was contained in correspondence between the claimant and the officers of the Government. Amongst other matters of controversy in the case there was a dispute as to the contract price of the rent. The court ascertained the

price, by construction of the said correspondence, and the acts of the parties in relation thereto, to be $500 per month for the first year, from the 23d of August, 1861, to the 23d of August, 1862, and $250 per month for the residue of the time. The Government had paid $500 per month up to and including the 30th day of June, 1862. On the 9th day of October, 1862, an account was stated by the Government officers, for the months of July, August, and September, 1862, at $250 per month, amounting to $750, and on that day the claimant's intestate received that sum without protest, and signed a receipt therefor, which recited that it was in full of the above-stated account. Chief Justice Waite, delivering the opinion of the court, states as follows:

"The United States hired for a year absolutely, at the agreed rent of $500 a month, and occupied during the whole of that term. They, therefore, by their agreement, were expressly bound to pay rent at that rate for the whole of that year. This they have paid in full to June 30; but after that, until the end of the year, August 23, 1862, their payments have only been at the rate of $250 a month. Payment by a debtor of a part of his debt is not a satisfaction of the whole, except it be made and accepted upon some new consideration. It is not found that there was any new consideration in this case. All that appears is that an account was made out for the rent from July 1 to September 30, at the new rate, and that this account was receipted by Mr. Lovett [the claimant's intestate] after payment. Upon this finding, therefore, in the absence of anything more, showing that the reduction in the rent of the first year was part of the agreement to continue the lease beyond the year upon new terms, the petitioner will be entitled to judgment for rent at the rate of $250 per month, from June 30 to August 23, 1862, that being the balance remaining after deducting payments made."

It will be seen upon inspection that the form of the receipt given in that case was precisely like the ones signed by complainant in this case.

It is not shown or contended that there was any consideration whatever, moving from the District to claimant in this case, as an inducement to him to accept a part of the sum in lieu of the whole.

The receipts in the present case were given to the Board of Audit. This court has held that that Board had no power or jurisdiction to adjudicate, settle, or compromise disputed claims against the District government, but that its powers and duties were only "to examine and audit for settlement."

Cluss *vs.* Dist. of Col., 103 U. S., 705.

The right of said Board to AUDIT ANY claim expired on the first day of July, 1875, before the earliest of the receipts mentioned in this case was signed. After that date it acted as Auditor for current work only.

18th Stats. at Large, p. 509.

It follows that the receipts can have no force, except as evidence of the receipt by claimant of the amounts stated in them on account of the work done under his contracts.

It is with confidence submitted that the judgment of the Court of Claims should be reversed, and that court directed to enter judgment for claimant in the sum of $10,366.17, due and payable on the 1st day of November, 1875.

C. C. COLE,
JOHN C. FAY,
Attorneys for Claimant.

NOTE.—There is some inconsistency between the opinion and the findings of fact, which arises from the fact that the facts were amended after the decision was announced. See p. 5 of the Record, Order of Court, November 16, 1887.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE DISTRICT OF COLUMBIA, appellant, *v.* WILLIAM C. MURDOCK.	No. 1378.
WILLIAM C. MURDOCK *v.* THE DISTRICT OF COLUMBIA.	No. 1379.

BRIEF FOR THE DISTRICT OF COLUMBIA.

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BRIEF FOR THE DISTRICT OF COLUMBIA.

STATEMENT.

These are cross appeals. Murdock had contracts Nos. 916-230½, 44, and 384, for laying pavements in the city of Washington, to which there were certain extensions. Under these extensions, in the year 1875 he laid 51,830.94 square yards Scharf pavement, for which he was paid $3 per square yard. (Finding I, Tr., p. 5.)

It was agreed in these extensions that Murdock should receive the prices established and paid by the Board of

Public Works of the District of Columbia for work of similar character. (Finding III, Tr., p. 6.)

On September 14, 1871, the Board of Public Works took this action:

> The following scale of prices for work and material were then adopted by the Board:
> Wood and concrete pavement, $3 per yard; Scharf and Parisen pavement, $3.20 per yard.

The Board of Public Works between 1871 and 1874, and in said years, paid $3.20 to John O. Evans and others, on different contracts, for Scharf pavements, said payments being made on an aggregate of more than 25,000 yards. (Finding V, Tr., pp. 7, 8.)

On December 15, 1875, Murdock applied to the Board of Commissioners of the District of Columbia for an increase over the contract price for laying pavement on De Sales street, alleging that it was impossible, owing to the condition of the street, to lay a 7 or 8 inch concrete (which was the concrete of the contract), and that he was compelled to lay a pavement ranging in depth from 10 to 15 and 18 inches, and asking that he be paid the same price as paid for a 10-inch pavement on Pennsylvania avenue. The facts as stated by the contractor were certified to by the overseer of the District, and the additional price was recommended by the engineer, and adopted and paid by the Commissioners. The enchanced price was $3.70 per cubic yard, or 50 cents more than the $3.20, which is what the claimant says he was entitled to under his contract. (Findings VI, VII, Tr., pp. 8, 9.) The concrete pavement laid on Pennsylvania avenue was laid under a contract that fixed the price specifically at $3.70 per yard, and con-

tained specifications for the pavement laid thereunder not contained in the contract under which claimant laid the pavement on De Sales street. (Finding X, Tr., p. 11.) This excess payment was made matter of set-off, and allowed to the defendant by the court.

On July 28, 1875, a payment was made to claimant, Murdock, for work done up to that time, based on allowance of $3 per square yard for extensions of contract No. 916, and upon that payment he executed the following receipt:

> Received this 28th day of July, 1875, from the Board of Audit their certificate No. 14698 for $24,278.41 in full settlement of the above-stated claim.

It does not appear that the parties at the time said receipt was given had any settlement of disputed claims or items, or that said receipt was founded on an agreement made at the time, or was the result of a settlement between the parties. Before said payment there were laid of 51,830.84 square feet, 21,387.41 square feet. On said date (July 28, 1875), a similar receipt was executed for $14,285.13 under the same state of facts as detailed above. (Finding VIII, Tr., p. 9.)

It was agreed in all the extensions of these contracts that the original contracts should be extended, with their various terms, conditions, and stipulations. Contract 916, "the various terms, conditions and stipulations" of which are incorporated in this extension (and the other contracts are substantially the same—Tr., p. 7, Finding IV), provides—

> Frst. That the said party of the second part has agreed, and by these presents doth agree, with the

said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed, to furnish, at his own proper cost and expense, all the necessary materials and labor, and in good, firm, and substantial manner to lay and put down the pavement known as the Scharf concrete pavement on the carriageway, etc.

* * * * *

Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances or injuries to individuals, property, or otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractor; and the said contractor hereby agrees, in the execution of the said work as aforesaid, to keep at all times the said work properly guarded or protected so as to prevent all injuries to persons, travelers, animals, or property; and in the event of any such injury or injuries occurring in consequence of the insufficient guarding or protection of said work as aforesaid, the said party of the first part shall retain out of any money or moneys due or to become due said contractor a sum sufficient to cover all damages arising out of said injury or injuries until the same may be settled at law or otherwise.

* * * * *

Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of

the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

Laying and putting down the SCHARF concrete pavement per square yard, $3.20, which shall include 2 feet of grading.

The ninth clause of the original contract 916 is as follows:

It is further agreed if, at any time during the period of three years from the completion of the work to be done under this contract, any part or parts thereof shall become defective from imperfect or improper material or construction, and in the opinion of the said party of the first part require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the said party of the first part; and in case of a failure or neglect of the said party of the second part so to do, the same shall be done under the directions and orders of the said party of the first part at the cost and expense of the said party of the second part.

* * * * *

Thirteenth. And the said party constituting and composing the Board of Public Works in and for the District of Columbia aforesaid agrees with the said party of the second part to perform all the stipulations to this contract obligatory in it, and to pay or cause to be paid to the said party of the second part, or to his heirs, executors, or administrators, in lawful money of the United States, the amount which may be found from time to time due him according to the contract.

In 1872 and 1873 the Board of Public Works by order allowed 20 cents for grading in 1872, and in 1873 the sum of 30 cents, and under the order of 1872 they allowed

1 cent per cubic yard for every 200 feet haul over 200 feet, and under the order of 1873 they allowed 1½ cents per cubic yard for the same haul. The above allowances were being made at the time the contracts were extended.

In 1873 the Board of Public Works made contracts for concrete and Scharf pavements, under which it paid contractors the sum of $3.20 per square yard for laying such pavement, which price included 2 feet of grading. After that time $3.20 was the usual price paid by the Board of Public Works.

Claimant sues for 20 cents per cubic yard of pavement, 51,830.84 yards, $10,366.71, admitting he had been paid $3 per yard.

Defendant claims in its set-off: (1) $4,887.28 for amount paid for grading less than 2 feet; (2) $1,745.10, amount overpaid on De Sales street payment.

The matters of dispute may be stated as follows:

The District insists that the claimant was entitled after July 28, 1875, to be paid for laying pavement at the rate of $3 only per cubic yard, and that the 20 cents for 30,443.43 yards was improperly allowed claimant, and claimant insists that he was entitled to recover the full amount of $3.20 per cubic yard for all the pavement laid. Appellant further insists that he was entitled to the full amount stated in his set-off, being payments improperly and illegally made, while the claimant contends that these amounts were properly paid and received.

Judgment was entered for claimant in the sum of $6,569.75.

From this judgment both defendant and claimant appealed.

ASSIGNMENT OF ERRORS BY THE DISTRICT OF COLUMBIA.

I. The court erred in entering judgment for claimant in the sum of $6,569.75.

II. The court erred in not entering judgment for defendant upon its set-off.

ARGUMENT.

Conceding that, under the findings of fact of the Court of Claims, the claimants were entitled to receive $3.20 per cubic yard for all pavement laid prior to July 28, 1875, it is claimed a fair presumption is raised, that subsequently to that time the understanding was they were to continue the contracts at the price insisted upon by the officers of the District. It is true the findings are—

> That it does not appear that the parties at the time said receipt was given had any settlement of disputed claims or items, or that said receipt was founded on an agreement made at the time, or was the result of a settlement between the parties. (Finding VIII, Tr., p. 9.)

But it also appears from the findings that there was a difference of opinion between the contractor and the District officers as to the amount to be paid for this work, and although an explanation might have been received as to the receipts in full given prior to July 28, 1875, under the altered circumstances it could not be satisfactory to receipts given after that time. These latter receipts are evidence of acquiescence, and constitute an accord and satisfaction (*Comstock* v. *United States*, 9 C. Cls. R., 114; *Cape Ann Granite Co.* v. *United States*, 20 C. Cls. R., 10–15; *United States* v. *Childs*, 12 Wall., 232; *Mason*

v. *United States*, 17 Wall., 67; *Sweeny* v. *United States*, 17 Wall., 75; *Adams* v. *United States*, 7 Wall., 479; *In re Hurst*, 1 Flippi., 462.)

DEFENDANT'S SET-OFF.

Upon December 15, 1875, claimant addressed a letter to the Commissioners of the District asking that he be allowed $3.70 per yard for pavement laid on De Sales street, under an extension of contract 916, because of the terrible condition of the street. (Findings VI, VII, Tr., pp. 8, 9.)

This advanced price was allowed by the Commissioners upon $2,493\frac{3}{10}$ yards, in defiance of the provisions of the contract.

This overpayment of 70 cents per yard on $2,493\frac{3}{10}$ yards amounted to $1,745.31.

There can be no doubt of the right of the District to recover this sum. (*Roche* vs. *District of Columbia*, 18 C. Cls. R., 217, and cases there cited; *McElrath* vs. *United States*, 102 U. S. R., 426–440.)

But if the court should be of opinion that claimant is entitled to recover at the rate of $3.20 for laying pavement, then the overpayment would be $1,247.25, which was allowed by the court below.

> The payment [says that court] of the $1,745.48 was made after the completion of the work, and when the rights of the parties became vested as the result of that condition. Whatever was to be done afterward, by way of increasing the compensation, must be founded upon a gratuity, from the representatives of the District to the claimant, because of his misfor-

tunes in the construction of the work. It is insisted by the claimant that the Commissioners had a legal right to consider the hardship of the situation, and pay to the claimant 50 cents additional for every square yard laid by him on the street affected by the difficulties of construction.

* * * * *

The communication of the claimant, bearing date on the 15th of December, 1875, indicates clearly the character of his claim. He asked for a gratuity, pure and simple; so that the allowance was not the result of the settlement of a doubtful claim, but an act of kindness towards a party who had suffered from a condition of things not anticipated in the making of the contract. * * * The Commissioners were dealing with a public trust, and must confine themselves within the boundary of power and discretion indicated by the character and nature of their trust. A trustee must be faithful to the legal rights of his principal before he is generous to the demands of others. There was no inducement to operate on the mind of the authorities, in the line of the necessity or interest of the District, to justify them in making the allowance. The contract was fully performed, and there was not pending between the parties a doubtful claim which might be, or was, adjusted by the payment.

The other item in the set-off is $4,079.24, paid for excavation and haul. It seems certain that claimant can not be entitled to pay for actual excavation and haul within the 2 feet in addition to the $3.20 per yard for the pavement (*Jonathan Taylor's Case*, 17 C. Cls. R., 367). Therefore, if claimant is not entitled to the extra 20 cents

per yard for pavement laid, the District is not entitled to anything under the plea of set-off on account of sums paid for excavation and haul. The balance would, then, be in favor of the District on account of the overpayment on De Sales street, and judgment should be rendered for the District for $1,745.31.

If the claimant is entitled to recover the extra 20 cents per yard on all pavements laid under contracts entered into prior to the first settlement, at which claimant received $3 per yard in full payment for pavement, then the account would stand:

The District Dr. to Murdock.

To 21,387.41 yards of pavement, at 20 cents additional per yard	$4,277.48

Murdock Dr. to the District.

To overpayment on De Sales street	$1,745.31
To payment for excavation and haul made in lieu of the 20 cents now recovered and in part payment of it	4,079.24
	5,824.55
Balance due District, for which judgment should be rendered for defendant	1,547.07

Or, if claimant was entitled to the 20 cents extra for the work on De Sales street as well as to that above, the account would be:

District to Murdock, Dr.

For 21,387.41 yards of pavement, at 20 cents additional per yard	$4,277.48

Murdock to District, Dr.

To overpayment on De Sales street	$1,247.25
To payment for excavation and haul made in lieu of the 20 cents now recovered and in part payment of it	4,079.24
Balance due District, for which judgment should be rendered for defendant	1,049.01

Or, if the $3.20 is to be regarded as a sum in entirety for all the work done in and about the laying of the pavement, then claimant should be allowed $10,366.17, as found by the court below, and the District on its set-off should be credited with $5,824.55, the amount of overpayments and payments outside the contracts, and judgment be entered for claimants for only $4,541.62.

Respectfully submitted.

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ROBERT A. HOWARD,
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